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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 108

JOHN G. STEPHENSON, III,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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JOHN G. STEPHENSON, III,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in the above-entitled case in Customs Appeal No. 5173 on December 10, 1964.

Citations to Opinions Below

The opinion of the Customs Court, CD 2425, printed in Appendix B hereto, is reported in 99 Treasury Decisions (Advance Sheets) 38. The opinion of the Court of Customs and Patent Appeals, CAD 850, printed in Appendix B hereto, is reported in 100 Treasury Decisions (Advance Sheets, No. 8, March 4, 1965) 72.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered December 10, 1964. On petition duly filed, rehearing was denied February 4, 1965. The jurisdiction of this court is invoked under 28 U. S. C. § 1256.

Questions Presented

(1) Whether an act of Congress which amended the Tariff Act of 1930 so as to reduce the exemption from duty allowed returning residents on articles acquired abroad for personal use as an incident of their journey, can be construed so as to continue the exemption with respect to articles acquired abroad in reliance on the law before the date of the amendment, but not entered until after the amendment; and, if not

(2) Whether the amending act would be unconstitutional under the Fifth Amendment.

Statutes Involved

The constitutional and statutory provisions involved are: (1) the Fifth Amendment to the Constitution of the United States; (2) the Tariff Act of 1930, as amended to August 1, 1961, the date on which the merchandise was acquired; particularly 19 U. S. C. § 1201, par. 1798(c)(2) and § 1651(c); and (3) the Act of August 10, 1961, P. L. 87-132, 75 STAT. 335. They are reprinted in Appendix A, *infra*.

Statement

Petitioner and his wife departed the United States July 5, 1961, upon a summer vacation trip to Europe, and returned to the United States on September 12, 1961. While

they were in Copenhagen, Denmark, on August 1, 1961, they purchased a fur jacket for the personal use of the petitioner's wife. At the time of the purchase, the customs laws provided that returning residents might bring into the United States duty free articles acquired abroad as an incident of their journey to the value of $500 when they had been absent a sufficient period, and that members of a single family traveling together might pool their individual allowances, thus permitting petitioner and his wife to claim an exemption of one thousand dollars. Ten days after the purchase, the law was amended to reduce the allowance to $100 for each person, or $200 for petitioner and his wife. The fur jacket would have qualified for free entry under the law as it stood on the day of purchase. By arrangement with the seller at the time of purchase, the fur jacket was sent through the mails to petitioner at his home in Rosemont. The jacket was declared at St. Albans, Vermont, the port through which petitioner and his wife returned, on September 12, 1961. The jacket was received in Philadelphia on October 20, 1961, assessed for duty (although a renewed claim for exemption was made), and released to petitioner on liquidation the following day.

Petitioner and counsel for the government submitted the case in the Customs Court on stipulation as to the essential facts made in open court: the dates of arrival and departure, the date of purchase, the retail price, the assessed valuation, the duty and the liquidation.

Petitioner made timely filing of his protest with the Collector of Customs of the Port of Philadelphia on December 19, 1961, under the provisions of 19 U. S. C. § 514. The collector reviewed the protest and transmitted it to the Customs Court under the provisions of 19 U. S. C. § 515.

In his protest to the collector, petitioner contended that the Act of 1962 could and should be construed so as to exempt articles purchased in reliance on the law before the amendment, invoking the rule of construction that a law will be construed so as to avoid retroactive effect in order to avoid injustice and grave doubts of constitutionality. Before the Customs Court, he also contended that the act, as interpreted by the collector, was unconstitutional.

The Customs Court held that the right of exemption did not accrue until the tourist returned to the United States; that the amendment was therefore not retrospective so as to require the construction asked or as to be unconstitutional; and that 19 U. S. C. § 1651 was intended to apply only to rights accruing before the effective date of the Tariff Act of 1930. In reaching this result, the Customs Court held that the wording of the act was so clear that the court could not consider the legislative history. The Court of Customs and Patent Appeals affirmed the decision of the Customs Court, holding that the petitioner had failed to show any rights accruing under the Tariff Act of 1930 as amended prior to the date of amendment.

Petitioner has appeared in this case and now appears before this court in his own person. He is not a member of the bar of this court or of the lower courts. He was admitted to practice law in Pennsylvania in 1934, but has devoted his full time to teaching law since 1946. He is now Professor of Law in Villanova University.

Reasons for Granting the Writ

(1) The decisions of the lower courts in this case are in conflict with the decisions of this court on retrospective excise taxes, of which Nichols v. Coolidge, 273 U. S. 531 (1927) was cited to and relied upon in the courts below.

That case involved Federal estate taxation, but the principles are the same. Nichols v. Coolidge established the rule that an excise on a future event, if designed to affect past transactions beyond recall, is unconstitutional under the Fifth Amendment.

In Nichols v. Coolidge, the Federal Estate Tax Act was amended to include in the taxable estate *inter vivos* gifts, whenever made, in which the possession or enjoyment of the beneficiary was postponed until after the death of the donor. This court found that the dominant legislative purpose was to discourage the use of such gifts as a means of avoiding the Federal estate tax, although no problem of evasion was present. The decedent had made an irrevocable gift prior to the passage of the act, but he was still alive, and the future interest had not vested in possession or enjoyment when the law was changed.

In this case, there was an excise on a future event, namely the importation of articles acquired abroad; but the legislative history of the amendment reducing the tourist exemption clearly shows that it was requested by the President and recommended by the Congressional committees to discourage the spending of money abroad. See Senate Report No. 483, 87th Congress, reprinted for the court's convenience in Appendix C.

The Court of Customs and Patent Appeals was of the opinion that petitioner's case depended upon a showing that he had acquired a vested right to import the merchandise under the Tariff Act of 1930, as amended. This view is apparently deduced from the premise that, since there can be no violation of the Fifth Amendment unless property is taken, there can be no unconstitutional tax under the Amendment unless a vested right is somehow affected. Indeed, the obsolete cases on which the court below relied,

such as Bragg v. U. S., 2 Ct. Cust. App. 22, T. D. 31575, would seem to go so far as to say that an excise, being distinguishable from a property tax, could not violate the Fifth Amendment because it is not levied on property, and the only constitutional problem would be one of jurisdiction to tax.

Nichols v. Coolidge, however, establishes the proposition that an excise tax, if arbitrary and capricious, may be a violation of the Fifth Amendment. The property taken is the amount of the tax.

> An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character, and beyond recall. This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. 273 U. S. 531, 542 (1927).

Petitioner relied in the lower courts on rights created and protected by the Constitution as well as rights vested under the Tariff Act of 1930. This point was emphatically called to the attention of the Court of Customs and Patent Appeals on oral argument, since the respondent had stated at the very outset of his written argument that "As appellant points out, his case depends upon a showing that he acquired a substantial right at a time prior to the actual importation of the fur jacket * * *" Petitioner did challenge the Customs Court's interpretation of the Tariff Act of 1930, because he found it inconceivable that Congress could have enlarged the tourist exemption in order to encourage the expenditure of American funds abroad without impliedly granting a license to purchase such goods as well as to import them. However, in passing on to the issues of construction and constitutionality, petitioner did

argue, both in his brief and orally, that his "rights" depended upon the Constitution.

Nichols v. Coolidge holds that "under the guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results." 274 U. S. 531, 541 (1927). If Congress can do indirectly what it cannot do directly, the legislative power would be a limitation upon the constituent, not the Constitution a limitation upon the powers of Congress. If Congress had levied an excise on the act of purchasing the fur jacket, which had taken place ten days before the passage of the act, there would have been a clear violation of the Fifth Amendment, an excess of the basic jurisdiction to tax, or even a "bill of pains and penalties" obnoxious to Article I, Section 9, clause 3 of the Constitution.

The tax on importation had the same effect as a tax on the acquisition of the jacket. An American tourist, traveling abroad with his wife, who acquires a fur jacket for his wife's use, has made a substantial investment. He cannot avoid the tax without abandoning the jacket or abandoning the remainder of a trip in which he has another substantial investment. Either course would normally result in at least as much loss as the payment of the tax. While a tax, lawfully imposed, is not to be thought of as a penalty, it is clear that the duties provided in the Tariff Act were considered by the executive and legislative branches to be sufficient to discourage foreign purchases. See Senate Report No. 483, reprinted in Appendix C.

Whatever might have been the case in other circumstances, petitioner acted under the law, and in a way in which he was expected to act, when he purchased the jacket. The exemption of tourists from the tariff, which dates back

at least to 1799, was designed to remove the tariff as a deterrent to imigration and travel. Astor v. Merritt, 111 U. S. 202 (1884). When the exemption for returning residents was increased from $100 to $400 in 1948, and from $400 to $500 in 1949, it was done to encourage the spending of American funds by tourists traveling abroad. Senate Report No. 483, reprinted in Appendix C. An act of Congress cannot be effective to remove a deterrent to travel or to encourage the expenditure of funds unless it is meant to guide action at the moment when decisions must be made.

The holdings of the lower courts are not only inconsistent with the decision of this court in Nichols v. Coolidge: they are also inconsistent with Congress's own interpretation of the limitations on its own power. Beginning at least as far back as 1883, the successive tariff acts have contained the clause, "the repeal of existing laws or modifications thereof contained in this chapter, shall not affect any act done, or any right accruing or accrued, or any suit had or commenced prior to such repeal or modification." Sec. 13, Act of March 3, 1883; 22 STAT. 526. The words "or reenactments" are first added to the formula in the Tariff Act of 1930 (19 U. S. C. § 1651). The formula had most recently been used in the Customs Simplification Act of 1953, 67 STAT. 521, which recast the tourist exemption into the form which it had when petitioner purchased the jacket. The repetition of this formula shows that the legislature was conscious of the need to protect acts done in accordance with the law, whether as a matter of Constitutional limitation or as a matter of sound legislative practice.

To show that there has been a transgression of the Fifth Amendment, it is not enough to show that a law is retrospective: it is also necessary to demonstrate that it is arbitrary and oppressive. Government may deal with public

nuisances, tax evasions, and the introduction of imports harmful to the domestic health, safety and welfare. Petitioner sought to show that the law as interpreted was arbitrary and unnecessary. The legislative history shows that it was designed to be a part of a program to counter our unfavorable balance of payments in international transactions. Senate Report No. 483, reprinted in Appendix C. Neither tax nor penalty can possibly recall what has already been spent. The government made no effort to justify the retrospective effect of the act, except as a matter of administrative convenience. If there had been some proper justification, it would surely have been advanced.

The effect of the Act of August 10, 1961, which reduced the tourist exemption, was postponed until the thirtieth day following passage. Sec. 1(b), 75 STAT. 335, reprinted in Appendix A. This shows clearly that Congress did not intend the general effect of the act to be retrospective.

(2) Petitioner also urged the lower courts to construe the Tariff Act as amended by the Act of August 10, 1961, as exempting purchases made before the date of the amendment, invoking the presumption against retrospective construction. See Hassett v. Welch, 303 U. S. 303 (1938). Treating the Act of 1961 as a reenactment of the basic act as amended, 19 U. S. C. § 1651 would now relate to the date of reenactment, and would specifically declare that no act done prior to the amendment would be affected thereby. The Customs Court was of the opinion that the language of the act was too clear to permit construction; but this court has held that even the most explicit language can be the subject of construction when, coming to be applied to specific situations, a retrospective effect is discovered. U. S. v. American Sugar Refining Co., 202 U. S. 563 (1906).

Petitioner, in examining the committee reports and the Congressional Record, has found no discussion of any problem concerning the effective date of the act. It is his belief that, because of the provisions delaying the effective date for thirty days in Section 1(b), neither the executive department which drafted the bill nor the legislative committees which studied it foresaw a problem of retrospective effect. The need to deal with this problem did not arise until the first tourists began to return on September 9, 1961. This court has held that it is within the power of the courts to correct such an oversight through construction: U. S. v. Burr, 159 U. S. 78 (1895).

(3) If the decisions of the lower courts have been in error, petitioner has been denied an important constitutional right. Although the sum involved in this proceeding is no more than $162.50, the cost of vindicating that right has now begun to approach the value of the fur jacket. There are hundreds of persons like the petitioner who have suffered illegal exactions from what this court has called in Nichols v. Coolidge, *supra*, "arbitrary and capricious" government. Petitioner is acquainted with a number of persons in the academic field who returned after September 9, 1961, from extensive periods of study abroad to be assessed duty on articles acquired long before the first proposals to reduce the exemption were made. These persons liquidated their assessments without protest, finding it cheaper to pay an outrageous exaction than to contest it. A number of protests filed with the Collector in Philadelphia were abandoned when they were forwarded to the Customs Court.

All of these cases, except for petitioner's, are now closed. The latest news reports, however, indicate that the nation is still faced with a drain on its gold reserves to which

increasing foreign travel contributes substantially. Much more is spent abroad on entertainment, food, transportation and lodging than was ever spent on merchandise to bring home. It is rumored in the press that the administration is considering further legislation to cope with this problem.

If petitioner's position is correct, the principles which were formerly well understood by the legislative branch (see 19 U. S. C. § 1651) are not understood by the personnel of the executive branch who drafted the bill which became the Act of August 10, 1961, or by the personnel who later defended a contrary position with skill and vigor. Their views are shared by the courts below. It is therefore clear that the law is not understood, and very important that it be clarified by a decision of this court before further legislative action is taken in accordance with the opinions in this case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to review the decision of the Court of Customs and Patent Appeals in Customs Appeal No. 5173, should be granted.

Respectfully submitted,

JOHN G. STEPHENSON, III,
Petitioner, pro se.

APPENDIX A

Constitutional and Statutory Provisions

(1) The Fifth Amendment to the Constitution of the United States

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

(2) The Tariff Act of 1930 as amended to August 1, 1961, Title 19, United States Code (1958 Edition)

§ 1201. Free List.

Except as otherwise specified provided for in this chapter, the articles mentioned in the following paragraphs, when imported into the United States * * *, shall be exempt from duty.

Par. 1798. (a) * * *

(c) In the case of any person arriving in the the United States who is a returning resident thereof—

(1) all personal and household effects taken abroad by him or for his account and brought back by him or for his account; and

(2) articles (including not more than one wine gallon of alcoholic beverages and not more than one hundred cigars) acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with regulations of the Secretary of the Treasury, up to but not exceeding in aggregate value—

(A) $200, if such person arrives from a contiguous country which maintains a free zone or free port

(see subparagraph (d) of this paragraph), or arrives from any other country after having remained beyond the territorial limits of the United States for a period of not less than forty-eight hours, and in either case has not claimed an exemption under this subdivision (A) within the thirty days immediately preceding his arrival; and

(B) $300 in addition, if such person has remained beyond the territorial limits of the United States for a period of not less than twelve days and has not claimed an exemption under this subdivision (B) within the six months immediately preceding his arrival.

§ 1651. REPEALS—SPECIFIC REPEALS

(a) The following Acts and parts of Acts are repealed, subject to the limitations provided in subdivision (c) of this section: * * *

General repeal

(b) All Acts and parts of Acts inconsistent with the provisions of this chapter are repealed.

Rights and liabilities under acts repealed or modified

(c) The repeal of existing laws or modifications or reenactments thereof embraced in this chapter shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil or criminal case prior to such repeal, modifications, or reenactments, but all liabilities under such laws shall continue and may be enforced in the same manner as if such repeal, modifications, or reenactments had not been made. All offenses committed and all penalties, under

any statute embraced in, or changed, modified, or repealed by this chapter, may be prosecuted and punished in the same manner and with the same effect as if this chapter had not been passed. No Acts of limitation now in force, whether applicable to civil causes and proceedings, or to the prosecution of offenses or for the recovery of penalties or forfeitures embraced in, modified, changed, or repealed by this chapter shall be affected thereby so far as they affect any suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to June 18, 1930, which may be commenced and prosecuted within the same time and with the same effect as if this chapter had not been passed.

(3) The Act of August 10, 1961, P. L. 87-132, 75 STAT. 335.

An Act to amend paragraph 1798 (c) (2) of the Tariff Act of 1930 to reduce temporarily the exemption from duty enjoyed by returning residents, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Paragraph 1798 (c) (2) of the Tariff Act of 1930, as amended (19 U. S. C., sec. 1201, par. 1798(c) (2)), is amended—

(1) by striking out "$200, if such person" in subdivision (A) and inserting in lieu thereof "$100 (or $200 in the case of persons arriving directly or indirectly from the Virgin Islands of the United States, not more that $100 of which shall have been acquired elsewhere than in the Virgin Islands of the United States) if such person arrives before July 1, 1963

(or $200 if such person arrives on or after July 1, 1963), and he either", and

(2) by striking out "$300 in addition, if such person" in subdivision (B) and inserting in lieu thereof "$300 in addition, if such person arrives on or beafter July 1, 1963, and he".

(b) The amendments made by subsection (a) shall apply with respect to persons arriving in the United States on or after the 30th day after the date of the enactment of this Act.

Sec. 2. In applying paragraph 1798(c) (2) (A) of the Tariff Act of 1930, as amended, to articles acquired in the Virgin Islands of the United States by any person who arrives in the United States (as defined in section 401 (k) of such Act) during the period beginning on the 30th day after the date of the enactment of this Act and ending on June 30, 1963, the 48-hour requirement in such paragraph 1798 (c) (2) (A) shall be treated as satisfied.

Approved August 10, 1961.

APPENDIX B

The Opinions of the Courts Below

DECISION OF THE CUSTOMS COURT

(C. D. 2425)

JOHN G. STEPHENSON, III

v.

UNITED STATES

Returning residents—Duty free status of merchandise acquired abroad—Date of arrival

United States Customs Court, Third Division

Protest 62/5827-91843 against the decision of the collector of customs at the port of Philadelphia

(Decided December 23, 1963)

RICHARDSON, Judge: The merchandise which is the subject of the instant protest consists of a fur jacket of Danish origin that was imported at Philadelphia and assessed for duty under 19 U. S. C. A., section 1001; paragraph 1519(e) (paragraph 1519(e), Tariff Act of 1930, as modified by T. D. 51802) at 25 per centum ad valorem as "Articles, wholly or partly manufactured (including fur collars, fur cuffs, and fur trimmings), wholly or in chief value of fur, not specially provided for: Other." It is claimed in the protest that the fur jacket is entitled to free entry under 19 U. S. C. A., section 1201, paragraph 1798(c)(2) (paragraph 1798 (c)(2), Tariff Act of 1930, as amended) and 19 U. S. C. A., section 1651(c) (section 651(c), Tariff Act of 1930).

The facts are not in dispute. The plaintiff and his wife are residents of Rosemont, Pa. While traveling in Europe

in 1961 on a summer vacation trip, they purchased the jacket in question in Copenhagen, Denmark, on August 1, 1961. They returned to this country on September 12, 1961, entering the United States through the port of St. Albans, Vt., at which time declaration of the merchandise in issue was made. The jacket was shipped through the mail, arriving at Philadelphia on October 20, 1961, where entry of the jacket was made on the same day and liquidated as entered on October 21, 1961. At the time the fur jacket was purchased, free entry was permitted under paragraph 1798 (c) (2), *supra*, as follows—

(c) In the case of any person arriving in the United States who is a returning resident thereof—

* * *

(2) articles * * * acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with regulations of the Secretary of the Treasury, up to but not exceeding in aggregate value—

(A) $200, if such person arrives * * * from any other country after having remained beyond the territorial limits of the United States for a period of not less than forty-eight hours, and * * * has not claimed an exemption under this subdivision (A) within the thirty days immediately preceding his arrival; and

(B) $300 in addition, if such person has remained beyond the territorial limits of the United States for a period of not less than twelve days and has not claimed an exemption under this subdivision

(B) within the six months immediately preceding his arrival.

On August 10, 1961, paragraph 1798(c)(2), *supra*, was amended by Public Law 87-132 to reduce the exemption from $500 to $100 for a temporary period, to take effect between September 9, 1961, and July 1, 1963.

The collector applied the $100 duty exemption provided for in paragraph 1798(c)(2), *supra*, as amended by Public Law 87-132, against the duty assessment on the involved entry, by reason of plaintiff's arrival in this country after September 9, 1961, and before July 1, 1963, from his journey abroad. Plaintiff contends, upon the authority of 19 U. S. C. A., section 1651(c), that the collector should have applied against the involved entry the $500 duty exemption contained in paragraph 1798(c)(2), *supra*, before that statute was amended by Public Law 87-132. Section 1651(c), *supra*, which is relied upon by plaintiff, states:

> The repeal of existing laws or modifications or reenactments thereof embraced in this chapter shall not affect any act done, or any right accruing or accrued * * * prior to such repeal, modifications, or reenactments * * *

Plaintiff argues that the purchase of the fur jacket abroad gave rise to an accruing right to the claimed duty exemption within the meaning of section 1651(c), *supra*, and that such right was not affected by the subsequent enactment of Public Law 87-132. The Government maintains that plaintiff possessed no such right to the claimed duty exemption and argues, in substance, that the law in effect on the date of plaintiff's arrival in the United States, rather than the law in effect on the date of plaintiff's purchase of the subject merchandise abroad, determines what rights plaintiff has in the matter of duty exemptions, and

that, as such, the reduced exemption provided for in paragraph 1798(c)(2), *supra*, as amended by Public Law 87-132, was properly applied by the collector.

We are of the opinion that section 1651(c), *supra*, may not be invoked by plaintiff to preserve statutory privileges which have been superseded by other statutes limiting such privileges. *Joseph O. Saurette* v. *United States*, 1 Cust. Ct. 38, C. D. 10. We use the word "privileges" advisedly, because we do not perceive the claimed right, whether accruing or accrued, to be anything more than a privilege which Congress may withdraw or modify at any time—there being no vested right to import foreign merchandise into this country. *The Board of Trustees of the University of Illinois* v. *United States*, 20 CCPA 134, T. D. 45773. But even if the duty exemption contended for by plaintiff were considered to be a matter of right in the sense that even a privilege may not be arbitrarily withdrawn or curtailed, the savings clause in Section 1651(c), *supra*, would not be available to plaintiff to preserve such right from suspension. Section 1651(c), *supra*, relates solely to laws in existence at and prior to the passage of the Tariff Act of 1930 which are in some way affected by the act of 1930. Section 1651(c), *supra*, does not operate upon amendments made within the Tariff Act of 1930 itself, of which section 1651(c), *supra*, is a part. Such a construction of this savings clause would render it virtually impossible for Congress to effectively provide for modification of provisions of the act of 1930 as and when it deemed such modification expedient or necessary, as in the cutoff dates on quota merchandise, for example.

The case of *The Mengel Co.* v. *United States*, 20 CCPA 399, T. D. 46232, which is cited by plaintiff in this connec-

tion, does not support the application of section 1651(c), *supra,* to amendments made by Congress to various provisions of the Tariff Act of 1930 from time to time. If anything, that case is consonant with our interpretation of the scope of section 1651(c), *supra.* In the *Mengel* case, the question decided was whether a provision in the Tariff Act of 1922 pertaining to drawback was superseded by a like provision on the subject of drawback in the Tariff Act of 1930. The court there held that the provision in the act of 1922 was not superseded by the provision in the act of 1930 by reason of section 1651(c).

Plaintiff lays great stress upon the act of purchasing the fur jacket abroad as giving him a vested right, adverting to such expressions as governmental encouragement of foreign purchases by American tourists, reliance upon the larger duty exemption as being an inducement to make such foreign purchases, and what he regarded as frustration of the legislative intent to curb such foreign expenditures in cases where purchasers of foreign goods antedated the enactment of the reduced duty exemption legislation. Actually, it will be observed from paragraph 1798(c)(2), *supra,* that Congress placed no emphasis in this legislation upon the manner by which the merchandise was acquired. Thus, it is entirely possible under paragraph 1798(c)(2), to claim the duty exemption with respect to merchandise acquired abroad by means other than by purchase, such as by gift or bartering. But, however the merchandise is acquired abroad, it is essential under paragraph 1798(c)(2), *supra,* that it be acquired *as an incident of the journey* from which the resident is returning in order to qualify such merchandise for the duty exemption. *Cf. United States* v. *Herbst,* 48 CCPA 145, C. A. D. 781. The aforementioned argument of plaintiff, as well as his argument favoring the extension of the effective date of

the new law in deference to accruing rights of American residents who went abroad and made purchases of foreign goods while abroad on the strength of the old law, are not persuasive against the statutory requirement.

As we read paragraph 1798(c)(2), *supra*, the date of arrival in this country of the returning resident fixes his right to exemptions under its provisions. All of the duty exemption provisions contained in paragraph 1798(c)(2), *supra*, are prefaced by the statement *In the case of any person arriving in the United States who is a returning resident thereof*. This language, it seems to us, is a clear expression of the legislative intent to fix the act of arrival of the resident as the event which determines the duty exempt status of his merchandise. In the case at bar, that status was determined on September 12, 1961, the date of plaintiff's arrival in the United States. At that time paragraph 1798(c)(2), *supra*, as amended by Public Law 87-132, was in effect and governed the exemptions to which plaintiff was entitled. The collector allowed the reduced exemption provided for in that statute in the assessment of duties against the involved entry, and we hold that the collector's action in this regard was proper. Since no claim has been made concerning the amount of the duties assessed against the involved entry, the collector's assessment is presumed to be correct.

Plaintiff also claimed, in his brief and argument, that paragraph 1798(c)(2), *supra*, as amended by Public Law 87-132, is unconstitutional as applied to the fur jacket which was purchased before this statute was enacted. However, we entertain some doubt as to the timeliness of such claim, in view of the omission of the claim from the protest filed by plaintiff, notwithstanding the fact that such claim could then have been made the subject of protest. Also, even

though plaintiff argued this point at the hearing, he did not propose an amendment to his protest to embrace the claim of unconstitutionality. (See *American Mail Line, Ltd.* v. *United States*, 34 CCPA 1, C. A. D. 335, and *Lamborn & Co., Inc.* v. *United States*, 27 CCPA 46, C. A. D. 60, certiorari denied, 308 U. S. 589.) But even if it were proper to consider this claim of unconstitutionality under the instant protest, we would be disinclined to sustain it by reason of the view which we have heretofore taken with respect to the absence of an accruing right to a duty exemption as to which Public Law 87-132 could be said to be retroactive. Public Law 87-132 was plainly prospective in application, and the higher duty exemption contended for by plaintiff could have been availed of thereunder only had plaintiff returned to this country before September 9, 1961.

For the reasons stated, the protest is overruled. Judgment will be entered accordingly.

RICHARDSON,
J.

Concurring:
DONLON
J.

DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term 1964.

JOHN G. STEPHENSON, III,

Appellant,

v.

THE UNITED STATES,

Appellee.

Customs Appeal No. 5173.
December 10, 1964.

SMITH, Judge.

Appellant, a resident of the United States, while traveling abroad, purchased a fur jacket in Copenhagen, Denmark, on August 1, 1961. He and his wife returned to the United States on September 12, 1961, at which time the jacket was declared and entered. The jacket was imported by mail on October 20, 1961, and duty was assessed under paragraph 1519(e) of the Tariff Act of 1930 (as modified by T. D. 51802), on the declared value less the returning resident's exemption in the amount then allowed by paragraph 1798 of the Act.

Paragraph 1798(c)(2) (as amended by T. D. 53318) provides for certain exemptions to returning residents. At the time appellant purchased the fur jacket, the maximum

allowable exemption for each person was $500. However, on August 10, 1961, Congress enacted P. L. 87-132 (75 Stat. 335), which became effective September 9, 1961 (three days prior to appellant's return to the United States) and reduced the applicable exemption to $100.

The collector ruled that appellant and his wife, as residents returning to the United States on or after September 9, 1961, were each entitled to a $100 exemption under P. L. 87-132, rather than the $500 exemption for each of them which was in effect at the time the jacket was purchased. Appellant filed a timely protest, claiming that the jacket was entitled to entry under paragraph 1798(c)(2) without duty because of the total $1,000 exemption which was there provided prior to the amendment. His protest was overruled by the United States Customs Court, Third Division (C. D. 2425). This appeal followed.

It is appellant's position that when he purchased the jacket on August 1, 1961, a right to import it under the provisions of paragraph 1798(c)(2), *as then in force,* became vested, and that this right to the larger exemption was unaffected by the subsequent amendment of the paragraph by P. L. 87-132. In support thereof, he cites section 651 of the Tariff Act of 1930 (19 U. S. C. A. 1651), which provides that "The repeal of existing laws or modifications or reenactments thereof embraced in this chapter shall not affect any act done, or any right accruing or accrued * * * prior to such repeal, modifications, or reenactments * * *."

Appellant asserts his right to the larger exemption as a matter of law, and states in his brief that three issues are presented for our determination, as follows:

I. Whether the Act of August 10, 1961 (75 Stat. 325) reduced the exemption as to goods acquired prior to the date of enactment.

II. Whether the Act of August 10, 1961, is constitutional under the Fifth Amendment if it did reduce the exemption with respect to articles acquired abroad prior to the date of enactment.

III. Whether the question of constitutionality can be raised in this court.

It seems to us, however, that decision of the present appeal turns on the single issue of whether duty assessments (and exemptions therefrom) are to be determined as of the date of entry of the dutiable goods into the United States. Appellant's position is that his "right" to the larger exemption vested on the date of his purchase of the coat; the government's position is that no such "right" vested in appellant as of the *purchase* date; rather, the right of appellant to make the importation and the duties applicable thereto must be determined as of the *entry* date.

In this regard, the Customs Court stated:

> As we read paragraph 1798(c)(2), *supra*, the date of arrival in this country of the returning resident fixes his right to exemptions under its provisions. All of the duty exemption provisions contained in paragraph 1798(c)(2), *supra*, are prefaced by the statement *In the case of any person arriving in the United States who is a returning resident thereof*. This language, it seems to us, is a clear expression of the legislative intent to fix the act of arrival of the resident as the event which determines the duty exempt status of his merchandise. In the case at bar, that status was determined on September 12, 1961, the date of plaintiff's arrival in the United States. At that time paragraph 1798(c)(2), *supra*, as amended by Public Law 87-132, was in effect and governed the exemptions to which plaintiff was entitled. The collector allowed the re-

duced exemption provided for in that statute in the assessment of duties against the involved entry, and we hold that the collector's action in this regard was proper. * * *

We are in full agreement. It is a long-established principle of customs law that rights of the type here asserted by appellant are to be determined at the time of entry and not prior thereto. In *United States* v. *Vowell*, 9 U. S. (5 Cranch) 368 (1809), the issue was whether salt which had arrived within the *collection district* of Alexandria prior to the time duty thereon had ceased, but which did not arrive in *port* until after the date providing for free entry, was subject to duty. The Court held that duties do not accrue until a vessel arrives at the port of entry. Since the plaintiff's rights were fixed at that time, he was entitled to free entry of the salt. *Cf. Koeller-Struss Co.* v. *United States*, 46 CCPA 83, C. A. D. 702.

Bragg v. *United States*, 2 Ct. Cust. App. 22, T. D. 31575, involved certain livestock exported from the United States while a provision of the Tariff Act of 1897 allowing free re-entry was in effect. Subsequently, the Tariff Act of 1909 repealed that provision but the importer claimed that he was still entitled to duty-free re-entry. As in the appeal at bar, the appellant there claimed, *inter alia*, that certain rights had vested prior to the passage of the 1909 Act. In overruling the claim the court said (at 23):

> As to the first point, it is sufficient to say that tariff laws create no *vested rights* to import free or at any particular rate of duty goods, wares, merchandise, or products of any kind. While such laws are in force a right to import, as therein provided, may be said to exist; but its continued enjoyment is dependent on the continuance of the law which gave it, and therefore it can not be considered as vested in the sense that it has

> become property of which the owner can not be deprived without due process of law. The citizen has no *vested* rights in statutory exemptions from taxation, and such exemptions are always subject to recall when they have been extended as a privilege and not granted for a consideration received by the public. (Cooley's Const. Lim., 546, 547; Cooley on Taxation, 111.) The taxing power of the Government is limited only by the Constitution, and in the exercise of that power that which is exempt from tax or duty today may be made taxable or dutiable tomorrow if Congress so wills it. * * *

Thus, since neither the purchase of the jacket nor any other act done by appellant subsequent thereto caused the asserted right to vest in appellant prior to the effective date of P. L. 87-132, section 651 is of no avail to appellant. Moreover, we agree with the Customs Court that

> * * * even if the duty exemption contended for by plaintiff were considered to be a matter of right in the sense that even a privilege may not be arbitrarily withdrawn or curtailed, the savings clause in Section 1651(c), *supra,* would not be available to plaintiff to preserve such right from suspension. Section 1651(c), *supra,* relates solely to laws in existence at and prior to the passage of the Tariff Act of 1930 which are in some way affected by the act of 1930. Section 1651(c), *supra,* does not operate upon amendments made within the Tariff Act of 1930 itself, of which section 1651(c) *supra,* is a part. Such a construction of this savings clause would render it virtually impossible for Congress to effectively provide for modification of provisions of the act of 1930 as and when it deemed such modification expedient or necessary, as in the cutoff dates on quota merchandise, for example.

Appellant's entire argument with regard to the constitutional issue which he raises is predicated upon his asserted acquisition of a vested right predating the effective date of P. L. 87-132, i.e., a vested right to import the jacket with duties to be assessed as provided in the law in effect at the *time of purchase*. Since we agree with the Customs Court that such "right" does not vest until the *date of entry*, we need not reach the question raised by appellant as to the constitutionality of P. L. 87-132. Under existing law, the operation of the amendment was prospective and not retrospective.

The judgment of the Customs Court is *affirmed*.

AFFIRMED

APPENDIX C

Legislative History

SENATE REPORT NO. 483

1961 U. S. Code Congressional and Administrative News, 2333.

Senate Report No. 483

The Committee on Finance, to whom was referred the bill (H. R. 6611) to amend paragraph 1798(c) (2) of the Tariff Act of 1930 to reduce temporarily the exemption from duty enjoyed by returning residents, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of the bill is to provide a temporary reduction from $500 to $100 in the amount of purchases abroad

that a returning resident of the United States may bring back into this country free of duty. This proposal was recommended by the President as a part of a program to counter our unfavorable balance of payments.

Amendment

The Finance Committee amended the bill to provide that an additional duty-free $100 worth of goods may be brought in from the Virgin Islands. This would mean that a citizen returning from the Virgin Islands could enter without payment of duty a total of $200 worth of foreign goods, provided that at least $100 of it was acquired in the Virgin Islands. It was felt that, because of its close relationship to the United States, its new program for the promotion of tourism could be assisted in some degree, and that the outflow of dollars to the territories and possessions of the United States is of a much less serious nature than that to other parts of the world. However, the 48-hour rule which applies to all areas except the Virgin Islands would be invoked on all goods not originating there. It should be noted that the amendment does not provide for an additional $200 for the Virgin Islands over and above the $100 provided for other areas. The maximum which could be brought in under any set of circumstances without payment of duty would be $200.

General Statement

Under existing law, a returning U. S. resident is allowed the following personal exemptions from duty on articles he has purchased abroad:

1. If the returning resident remains outside the territorial limits of the United States for at least 48 hours, he may claim an exemption from duty for $200 worth of articles acquired abroad. If, however, he returns through a port of entry on the Mexican border,

he need only have been absent from the United States for such time (not to exceed 24 hours) as the Secretary of the Treasury has by regulation provided with respect to such port. At present, these regulations require an absence of at least 24 hours (the maximum requirement permitted under the law) in the case of residents returning through one of the southern California ports below Los Angeles. In the case of other ports along the United States-Mexican border, there is no period of absence provided for. The exemption from duty described in this paragraph may be claimed once every 30 days.

2. If the returning resident remains outside the territorial limits of the United States for 12 or more days, he may claim an exemption from duty for $300 worth of articles acquired abroad. This additional exemption, which may be claimed together with the basic exemption described above, can be utilized only once in every 6-month period.

Thus, for the average U. S. resident returning from abroad, there is an effective duty-free exemption of $500.

The bill reduces this $500 exemption to $100 until the close of June 30, 1963, by eliminating the $300 additional exemption and by reducing the $200 basic exemption to $100. Except as explained below with respect to articles acquired in the Virgin Islands, the bill continues the present absence requirements set forth in paragraph 1, above. The exemption may be claimed not more often than once every 30 days. On and after July 1, 1963, the tourist exemption allowances presently in effect would be restored.

Four hundred dollars of the present five-hundred-dollar exemption allowed returning residents reflects legislation enacted in the early post-World War II period aimed at

stimulating the flow of dollars to those countries which then badly needed dollars. In 1948, Congress increased the tourist exemption from $100 to $400. In 1949, an additional $100 was added, bringing the total exemption to its present level of $500.

Dating back to at least 1799, all persons arriving in the United States from abroad were permitted free entry of their "personal effects." This exemption was aimed at permitting persons emigrating to the United States to bring in their personal belongings free of duty. However, the law was so written and applied that many U. S. tourists returning from abroad were given the same treatment as was extended to immigrants. In many cases it was alleged that these tourists brought back as "personal effects" articles which they had purchased on their trip. Because of these alleged abuses the Congress, in 1897, restricted the "personal effects" provision to immigrants and at the same time provided a $100 tourist exemption for returning U. S. travelers. This $100 allowance remained in effect from 1897 until it was raised in 1948.

In a letter to the Speaker of the House of Representatives requesting this legislation, dated February 24, 1961, the President said:

> * * * After World War II, * * * foreign countries faced a dollar shortage and, as one measure to ease this shortage, Congress increased the tariff exemption by $300 in 1948 and by $100 in 1949, bringing the total exemption to $500. However, in the light of the existing balance-of-payments problem, this more liberal customs exemption, designed to encourage American expenditures abroad, is not presently warranted. Accordingly, the customs exemption should be returned to the traditional amount.

The reduced amount of tourist exemption called for by the bill will still leave the United States in the position of extending to its returning tourists more favorable duty-free treatment of articles purchased abroad than do most other countries of the world.

The bill provides that, as to articles acquired in the Virgin Islands of the United States, any person who arrives in the United States during the period beginning on the 30th day after the date of the enactment of the bill and ending at the close of June 30, 1963 (the same period that the first section of the act is effective), and who has remained outside the United States for less than 48 hours, the 48-hour requirement in paragraph 1798(c) (2) (A) of the Tariff Act of 1930 shall be treated as satisfied. For this purpose the term "United States" has the meaning given to it in section 401(k) of the Tariff Act of 1930 and includes all territories and possessions of the United States except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the island of Guam.

* *

MEMORANDUM

IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1130

JOHN G. STEPHENSON, III, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States Customs Court to challenge the assessment of duties by the Collector of Customs upon a fur coat which petitioner purchased on August 1, 1961, while on a vacation trip to Europe, and which petitioner imported into the United States on September 12, 1961. The assessment was determined under the Act of August 10, 1961, which reduced individual exemptions for residents, such as petitioner, returning to the United

States on or after thirty days after enactment of the Act. P.L. 87-132, 75 Stat. 335. The Act is set forth at Pet. 14-15.[1]

Petitioner's contention appears to be based upon the belief that, when he purchased the fur coat, he became vested with a legal right to import that coat under the then-existing duty provisions. Under this assumption, petitioner argues that the Act of August 10, 1961, although by its terms it "shall apply with respect to persons arriving in the United States on or after the 30th day after the date of the enactment of this Act," must be interpreted to apply only to goods purchased abroad after its enactment to avoid raising a constitutional issue, and that if it cannot be so interpreted, then the Act is repugnant to the Fifth Amendment prohibition of the deprivation of property without due process of law.

Both the Customs Court, 99 T.D. 38 (Pet. 16-22) and the Court of Customs and Patent Appeals, 100 T.D. 72 (Pet. 23-28) correctly rejected petitioner's argument and there is no warrant for further review by this Court. Petitioner's basic assumption is as patently without merit as is his suggestion that the Act of August 10, 1961, can be interpreted as not applying to him. The Tariff Act of 1930 imposes a duty upon the importation of goods, not upon the acquisition of goods abroad. Petitioner's rights were fixed on the date he became subject to the duty—the date of his return—and not earlier. As this Court has pointed out, "[n]o one has a legal right to the mainten-

[1] "Pet." references are to the Petition for Certiorari.

ance of an existing rate or duty." *United States* v. *Bush & Co.*, 310 U.S. 371, 379; *Arnold* v. *United States*, 9 Cranch 104.[2]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

MAY 1965

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[2] See also *Buttfield* v. *Stranahan*, 192 U.S. 470; *Heinemann* v. *Arthur's Executor*, 120 U.S. 82; *Meredith* v. *United States*, 13 Peters 486.

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